Norris Sucker Rods *and* Zachary Trosky. Case 17–CA–21436

September 15, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On October 18, 2002, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Norris Sucker Rods, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Refusing or failing to bargain in good faith with United Steelworkers Union of America, AFL–CIO–CLC, and its Local Union No. 4430 (Union) by failing or refusing to furnish the Union information relevant to the processing of grievances or the administration of the collective-bargaining agreement."

2. Substitute the following for paragraph 2(a)

"(a) Furnish to the Union in a timely manner a list of bargaining-unit employees who submitted absence excuse slips during the 6 months prior to October 29, 2001, and copies of the absence excuse slips for those employees with the names of treating physicians and medical information directly stating diagnosis, treatment, or medication given redacted."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 15, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[1] In agreement with the judge, we conclude that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the information requested by the Union on October 29, 2001, namely a list of employees who submitted absence excuse slips in the prior 6 months, and copies of the absence excuse slips for each of those employees with "medical information directly stating diagnosis, treatment, or medication given" redacted.

The judge did not separately address the Respondent's failure to provide the list of employees who had submitted absence excuse slips in the 6 months preceding the Union's request. The Respondent did not raise any claim of confidentiality or any other legitimate defense of its refusal to provide this relevant information about unit employees. Its failure to provide it violated Sec. 8(a)(5) and (1), and we shall therefore order the Respondent to provide it to the Union.

Although the Union requested a list of "all employees" who submitted absence excuse slips, we agree with the Respondent that the Union made no showing of relevance with respect to nonunit employees. Indeed, the record reflects that the Union intended to request the names and excuse slips of bargaining unit employees only, and did not intend for the request to encompass nonunit employees. We shall modify the judge's recommended order accordingly.

With regard to the redacted absence excuse slips, Respondent asserted during the hearing that, even after the Union's proposed redaction, it would be possible to discern the type of treatment provided to its employees by examining the treating physician's name. The Union did not assert any claim to the names of the treating physicians. In these circumstances, we shall require Respondent to produce the absence excuse slips with the names of treating physicians and medical information directly stating diagnosis, treatment, or medication given redacted.

There are no exceptions to the judge's finding that the question of which party should be required to bear the cost of producing the redacted absence slips was appropriate for the parties to address during bargaining.

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with the United Steelworkers Union of America, AFL–CIO–CLC, and its Local Union No. 4430 (Union) by failing or refusing to furnish the Union information relevant to the processing of grievances or the administration of the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish to the Union in a timely manner a list of bargaining-unit employees who submitted absence excuse slips during the 6 months prior to October 29, 2001, and copies of the absence excuse slips for those employees with the names of treating physicians and medical information directly stating diagnosis, treatment, or medication given redacted.

WE WILL on request bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit.

> All production and maintenance employees employed at the Respondent's Tulsa, Oklahoma facility, excluding watchmen, clerks, timekeepers, office force, office janitors, head nurse, industrial nurse, supervisors, executive staff, technical, engineering, quality assurance technician or time study men, clerical employees in the production control department and other employees excluded from such appropriate bargaining unit under the terms of the Labor-Management Relations Act of 1947, as amended.

NORRIS SUCKER RODS

Charles T. Hoskin Jr., Esq., for the General Counsel.
W. Kirk Turner, Esq., for the Respondent.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. The issue presented is whether the Respondent unlawfully refused to produce employee doctor excuses requested by the Steelworkers Union and thereby violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act).[2] On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following findings of fact.

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent, a manufacturer of steel products, has an office and place of business in Tulsa, Oklahoma. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the United Steelworkers of America, an affiliate of the AFL–CIO–CLC and its Local Union No. 4430 (Union) are labor organizations within the meaning of Section 2(5) of the Act.

II. REQUEST FOR INFORMATION

The Respondent and the Union have had a long-term collective-bargaining relationship at the Tulsa plant for a unit of production and maintenance employees. The parties' collective-bargaining agreement sets forth an excused attendance policy including medical/dental appointments "supported by approved doctor slip." The employees are subject to a credit system (points) that rewards or punishes their attendance. An employee who does not have a satisfactory doctor slip for a medical absence may be "pointed" for not complying with the excused absence policy.

The Charging Party, Zachary Trosky, is an employee at the Respondent's Tulsa plant. He serves as a steward for the local Union. In October Trosky received complaints from employees that the Respondent might be applying the doctor slip policy unevenly. On October 19, Trosky spoke to the Respondent's nurse, Debbie Romines, in an effort to learn how the policy was being enforced. He requested copies of all employees' doctor notes for the previous 6-month period. Romines passed on that request to Dan Bisett, the Respondent's human resources manager.

Bisett discussed the information request with Trosky on the same day. Bisett said he could not turn over the doctor slips without the Union first getting releases from employees. Bisett gave Trosky a medical release form for employees to sign. During their conversation Trosky stated that he had previously submitted a doctor's excuse that did not cover all of the days he had been absent and he was not pointed. This was the last time that representatives of the Respondent and the Union discussed the matter. Subsequent to this meeting Trosky received a point for the previously excused absence he had mentioned to Bisett. On October 24, Trosky filed a grievance on his own behalf for the point he had received.

On October 23, Trosky filed a written grievance concerning employee John Martin's complaint that he had been "pointed" for submitting an inadequate doctor's slip to the Respondent. Trosky noted in the grievance that "many other [similar] doctor's slips have been [accepted] no questions asked."

On October 29, Trosky left a written information request on Bisett's desk. That document stated

> In order to prepare for a grievance I am requesting a list of the names of all employees who have had doctor slips over the past six months, and copies of each doctor slip for these employees. Doctor slips that have any medical information directly stating diagnosis, treatment, or medication given should have said information blocked out. All other information should be kept intact.

Bisett subsequently read Trosky's request and replied by writing at the bottom of the letter

> Request denied. The Union must have signed a authorization from each [employee] permitting the Co. to release per-

[1] This case was heard at Tulsa, Oklahoma, on May 21, 2002. All dates in this decision refer to the year 2001 unless otherwise specifically stated.

[2] 29 U.S.C. § 158 (a)(1) and (5).

> sonal/medical information. You have that form in your possession. With respect to the number of [employees] presenting doctor's slip—such a task is laborious & expensive process. The Co. will under take such a task at the Union's expense. Kindly inform the Company if you (Union) are ready to pay for it.

The parties did not exchange any further communication on the subject. Trosky filed the charge in this case on November 7, and amended it on December 27.

Bisett testified that the retrieval of the information the Union was seeking would be laborious. He estimated that 6 month's worth of doctor slips could amount to 1400–1500 such excuses.

III. ANALYSIS

The Government contends that the Respondent's October 29, refusal to supply the names and doctor slip information requested by Trosky is an unlawful refusal to bargain. The Respondent argues that it has not refused to bargain but has only sought to protect confidential employee information from unauthorized release.

It is well settled that an employer has an obligation, under Section 8(a)(5) of the Act, to comply with a union's request for information which is relevant to the processing of grievances or the administration of a collective-bargaining agreement unless there is a showing that the information requested is unduly burdensome, legitimately confidential, privileged in nature, or has been waived. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Tom's Ford, Inc.*, 253 NLRB 888 (1980). The Supreme Court held in *Detroit Edison* that a union's interest in arguably relevant information does not always predominate over all other interests. Rather, the Court indicated that determining the employer's duty to supply such information when it is assertedly confidential requires a balancing of the union's need for the information against the legitimate and substantial confidentiality interests of the employer. The party asserting the claim of confidentiality has the burden of proof. *McDonnell Douglas Corp*., 224 NLRB 881, 890 (1976). In *Exxon Co. USA*, 321 NLRB 896, 898 (1996), the Board discussed such confidentiality claims in detail

> A union's interest in relevant and necessary information, however, does not always predominate over other legitimate interests. As explained by the Supreme Court in *Detroit Edison*, "a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested.'' 440 U.S. at 314. Thus, in dealing with union requests for relevant but assertedly confidential information possessed by an employer, the Board is required to balance a union's need for the information against any "legitimate and substantial'' confidentiality interest established by the employer. It is also well settled that, as part of this balancing process, the party making a claim of confidentiality has the burden of proving that such interests are in fact present and of such significance as to outweigh the union's need for the information. *Jacksonville Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995). Thus, to trigger a balancing test, an employer must first timely raise and prove its confidentiality claim. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072–1074 (1995). Further, an employer possessing the information and refusing to disclose it on confidentiality grounds has a duty to seek an accommodation through the bargaining process. Thus, when a union is entitled to information about which an employer has legitimately advanced a confidentiality concern in a timely manner, the employer must bargain towards an accommodation between the union's need for the information and the employer's justified confidentiality concern. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105–1106 (1991).

The Union seeks the doctor slips in order to gauge whether the Respondent has equitably administered the excused medical leave procedure. The Union's request was a legitimate inquiry designed to inform it, through comparative analysis, if the Respondent was disparately interpreting medical slips or unfairly giving points to employees. I find that the Union's request was relevant and reasonably necessary to its representative duty to investigate and prosecute grievances. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Doubarn Sheet Metal*, 243 NLRB 821 (1979).

The Respondent's conditions for producing the doctor slip information were (1) Medical releases from each employee were necessary in order to disclose "personal/confidential" information about the employee, and (2) The Union should pay the production costs. Trosky sought to meet the confidentiality issue by assuring the Respondent the Union did not seek information that would disclose "any medical information directly stating diagnosis, treatment, or medication." Thus the Union tried to eliminate the confidentiality issue altogether by agreeing with the Respondent that medical information should not be produced. The Respondent refused that limited request without stating any reason why redaction of medical references would not satisfy its confidentiality concern. The Respondent also did not seek to further discuss or clarify the matter with the Union. I find that the Respondent has not met its burden of showing that it had a legitimate and substantial interest in sheltering censored doctor's slips as confidential. *McDonnell Douglas Corp*., supra. Furthermore, the Respondent did not seek to negotiate an accommodation with the Union as to any of the alleged confidentiality concerns it had about the redacted doctor slips. *Exxon Company USA*, supra. I conclude, therefore, that the Respondent's refusal to produce doctor notes was a violation of its duty to bargain in good faith and was a violation of Section 8(a)(1) and (5) of the Act.[3] *Washington Gas Light Company*, 273 NLRB 116, 117 fn. 11(1984).

CONCLUSIONS OF LAW

1. Norris Sucker Rods, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Steelworkers of America, an affiliate of the AFL–CIO–CLC, and its Local Union No. 4430 are labor organizations within the meaning of Section 2(5) of the Act.

[3] The Respondent's second precondition to producing doctor slips involved the Union paying the costs of production. I find that is a matter for the parties to deal with through good-faith bargaining.

3. The Respondent violated Section 8(a)(1) and (5) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Norris Sucker Rods, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the United Steelworkers of America, an affiliate of the AFL–CIO–CLC, and its Local Union No. 4430, by refusing to furnish the Union with requested employee doctor slips (to the extent that such records do not include individual medical information).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union the requested employee doctor slips (to the extent that such records do not include individual medical information).

(b) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit

> All production and maintenance employees employed at the Respondent's Tulsa, Oklahoma, facility, excluding watchmen, clerks, timekeepers, office force, office janitors, head nurse, industrial nurse, supervisors, executive staff, technical, engineering, quality assurance technician or time study men, clerical employees in the production control department and other employees excluded from such appropriate bargaining unit under the terms of the Labor-Management Relations Act of 1947, as amended.

(c) Within 14 days after service by the Region, post at its facility in Tulsa, Oklahoma, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 29, 2001. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: October 18, 2002

APPENDIX

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Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the United Steelworkers of America, an affiliate of the AFL–CIO–CLC, and its Local Union No. 4430, by refusing to furnish the Union with requested employee doctor slips (to the extent that such records do not include individual medical information).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL furnish the Union requested employee doctor slips (to the extent that such records do not include individual medical information).

WE WILL on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit

> All production and maintenance employees employed at the Respondent's Tulsa, Oklahoma, facility, excluding watchmen, clerks, timekeepers, office force, office janitors, head nurse, industrial nurse, supervisors, executive staff, technical, engineering, quality assurance technician or time study men, clerical employees in the production control department and other employees excluded from such appropriate bargaining unit under the terms of the Labor-Management Relations Act of 1947, as amended.

NORRIS SUCKER RODS

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."